

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of the Cable Television)
Consumer Protection and Competition Act)
of 1992)

MM Docket No. 92-259

Broadcast Signal Carriage Issues

**SUPPLEMENT TO PETITION FOR
EMERGENCY RECONSIDERATION AND REQUEST FOR
MODIFICATION OF RULES OF YANKEE MICROWAVE, INC.**

On May 3, 1993, Yankee Microwave, Inc. ("Yankee"), by its attorneys, filed a "Petition For Emergency Reconsideration And Request For Modification Of Rules" in the above-referenced proceeding, specifically dealing with the "superstation exemption."¹ Yankee requested a narrow modification of that provision of the retransmission consent rules to provide for equal treatment of microwave (including cable TV-owned CARS) and satellite carriers which deliver superstation signals to cable systems.² Yankee's Petition was supplemented on May 6, 1993, June 14, 1993, June 18, 1993, and July 30, 1993. On August 18, 1993, on its own motion, the Commission issued a temporary 120 day waiver of its retransmission consent rule for each of

¹ The "superstation exemption" contained within the Commission's current retransmission consent rules exempts from retransmission consent superstation signals obtained from a satellite carrier, but not from other distributors such as microwave carriers - like Yankee, or cable TV-owned CARS systems. See 47 C.F.R. § 76.64(b)(2).

² Yankee's Petition For Emergency Reconsideration was only intended to address microwave delivery of superstation signals to cable systems located beyond a television station's ADI.

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Yankee's cable system customers carrying WSBK-TV.³ Since Yankee's last supplement, additional matters have come to light which bear consideration in connection with Yankee's Petition For Emergency Reconsideration.⁴

On September 14, 1993, Yankee received service of EMI Communication Corp.'s "Supplement to Request for Waiver," which had been filed with the FCC on September 10, 1993. A copy of the underlying September 8, 1993 "Request for Waiver" was subsequently procured. Like Yankee, EMI distributes video signals via microwave to cable systems in the northeast United States. EMI seeks a temporary waiver of the retransmission consent rule equivalent to that granted by the Commission on its own motion to Yankee. Specifically, EMI has requested a waiver of the retransmission consent rule for a period of 120 days for each of its cable system customers receiving superstation delivery via EMI microwave feeds, to allow the Commission time to reconsider the superstation exemption.

Although EMI seeks only a temporary waiver of the retransmission consent rule, it is vital that the Commission not

³ The FCC's intent was "...to provide the Commission opportunity to fully consider the specific issues raised [by Yankee's Petition For Reconsideration as well as others]" and "provide Yankee with an opportunity to secure retransmission consent from the affected superstation, WSBK-TV.." See Order, DA 93-1013, released August 18, 1993, at para. 3.

⁴ On May 3, 1993, simultaneously with the filing of its Petition For Emergency Reconsideration, Yankee filed a "Request For Stay" of the Commission's "superstation exemption" to the retransmission consent rules pending Commission action on Yankee's Petition For Emergency Reconsideration. A Petition for Reconsideration of the denial of Yankee's Stay Request is also currently pending before the Commission.

lose sight of Yankee's request that the language of the superstation exemption be revised to provide permanent parity for microwave carriers.⁵ A temporary waiver of retransmission consent requirements does not provide sufficient certainty to many cable operators to keep them from abandoning microwave carriers in favor of satellite. As long as uncertainty exists concerning the status of microwave signals, cable operators have a clear incentive to switch to satellite just to be assured of avoiding the necessity of obtaining retransmission consent in the near or intermediate future.

The effects of the present discriminatory treatment of microwave carriers vis-a-vis satellite carriers, will not be alleviated by **temporary** waivers or extensions. Even voluntary decisions on the part of individual superstations not to exercise retransmission rights for a limited period will not prevent the certain consequences that will befall Yankee if reconsideration and parity with satellite carriers is not granted. Since any grant of retransmission consent by a station can only be for a maximum term of three years under the 1992 Cable Act,⁶ and since

⁵ It is important to note that Yankee's Petition and request for comparable treatment has not been opposed by any entity, including satellite carriers or superstations. In fact, as the Commission has already recognized, WSBK-TV itself has stated that it "does not oppose Yankee's petition to the extent that it only exempts out-of-market cable systems from retransmission consent." See Comments of WSBK Licensee, Inc., MM Docket 92-259, filed June 7, 1993, at fn. 1; In re: Waiver of Section 76.64 for Yankee Microwave, Inc., DA No. 93-1013, released August 18, 1993, at fn. 7.

⁶ See Communications Act of 1934, as amended, Section 325(b) (3) (A).

consents are being given for far less time periods,⁷ uncertainty remains as to the future availability and cost of retransmission rights. As long as the retransmission burdens are placed on microwave carriers alone, thus raising the possibility of significant present or future costs to negotiate and obtain retransmission consent, cable operators will continue to abandon microwave in favor of the certainty of exemption from retransmission consent available via satellite-fed signals.⁸ This Sword of Damocles must be removed through a grant of parity in regulatory treatment, as Congress intended. (See p. 5, infra)

It is clear the superstation exemption, in its current form, is perversely eliminating competition for delivery of video signals. Yankee has clearly shown, as the Commission concurred, that it has already lost a substantial percentage of its microwave business, and is threatened with imminent loss of even more business, as a result of the Commission's current interpretation of the superstation exception.⁹ EMI also

⁷The trade press reports that Fox Television Network has granted 60 day consents to cable systems to allow Fox affiliates to address how they wish to handle the retransmission/must-carry issue.

⁸ The national and trade press have provided extensive coverage regarding the difficulty certain cable systems are now experiencing in negotiating retransmission rights. Negotiations are still underway, or just commencing, at this late date for substantial portions of the industry. Currently, as to distant signals (i.e., outside the home ADI's of particular television stations, such as WSBK-TV), this burden is placed only on cable operators who receive signals via microwave, thereby providing a distinct incentive to switch to satellite.

⁹ See In re: Waiver of Section 76.64 for Yankee Microwave, Inc., DA No. 93-1013, released August 18, 1993, at Par. 3. Therein, the Commission stated: "[w]e are persuaded by the

demonstrates that the discriminatory superstation exemption has already cost it 19% of its microwave revenues, and it expects to lose additional business as the October 6th deadline for retransmission consent approaches.¹⁰

This result is clearly contrary to Congress' intent through the 1992 Cable Act to promote competition in the video marketplace and improve cable service.¹¹ The legislative history of the superstation exemption unequivocally indicates it was intended to protect existing viewing patterns of popular superstations, regardless of how they are actually received by the affected cable system. The Senate Report states that "[i]n order to avoid sudden disruption to established relationships, the new Section 325(b)(2) exempts users of broadcast signals that were transmitted by a satellite carrier or common carrier on May 1, 1991." S. Rep. No. 92, 102d Cong. 1st Sess. 37 (1992) (emphasis supplied)

In light of the foregoing, Yankee respectfully requests that the Commission not postpone reconsideration of the current language of the superstation exemption as a result of any

evidence submitted by Yankee that it is threatened with imminent loss of a large percentage of its video microwave business as a result of our current interpretation of the superstation exception." Id.

¹⁰ See Request For Waiver, EMI Communications Corp., filed September 8, 1993, at 6.

¹¹ Microwave service developed in the northeastern United States in part because the satellite look-angle in that region is often too acute to provide a clear signal. If cable operators are forced to abandon microwave in favor of satellite to avoid significant retransmission consent costs, cable signal quality could well be adversely affected.

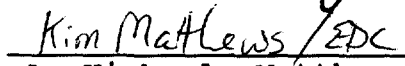
permitted brief waivers of that rule or brief extensions/consents thereunder. It is imperative for the Commission to act swiftly to revise the superstation exemption to provide for **equivalent treatment** of microwave and satellite carriers vis-a-vis cable systems' carriage of superstations beyond their ADIs. This is totally consistent with Congress' intent in the 1992 Cable Act. Such parity interpretation will also prevent elimination of microwave carrier competition to satellite carriers and assist cable TV systems in cost containment.


Respectfully submitted,

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Date: September 29, 1993

CERTIFICATE OF SERVICE

I, Julie Bonilla, a secretary in the law firm of John D. Pellegrin, Chartered do hereby certify that I have on this 29th day of September, 1993 transmitted a copy of the attached "Supplement to Petition for Emergency Reconsideration and Request for Modification of Rules of Yankee Microwave, Inc." by U.S. mail, postage prepaid to the following:

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